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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates ..... Appellant.

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

REPLY BRIEF OF APPELLANT TO BRIEFS OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF AND SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS

Frank R. Ellerbe, III (Bar No. 1866)
Samuel J. Wellborn (Bar No. 101979)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-929-1400
Email: fellerbe@robinsongray.com
swellborn@robinsongray.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

As discussed herein, the Court should reject the Consumer Advocate's arguments concerning the Company's Return on Equity ("ROE") and also reject the 7.46% ROE used by the Commission because it is unsupported by the record and unlawful. Further, contrary to the arguments offered in the ORS Brief, there is no reasoning or rationale articulated in the Commission's order supporting the imposition of a 10-year storm cost normalization, and there is no evidence in the record supporting such normalization. As related to ORS's arguments regarding the Company's office expenses, ORS fails to support the Commission's erroneous decision-making or overcome the presumption of reasonableness owed to the Company. Finally, the Court should reject the Consumer Advocate's argument that the Commission has essentially unlimited authority that supersedes the plain provisions of S.C. Code Ann. § 58-5-240(D), which expressly grants utilities the right to implement rates during appeal subject to refund.

No party has contested Blue Granite's positions as to the Commission's erroneous rate treatment of ongoing purchased water and wastewater expenses, erroneous disallowance of certain expenses incurred as a result of Administrative Law Court proceedings, erroneous disallowance of legal expenses from two previous Commission proceedings, and erroneous disallowance of the Company's headquarters rent expense[1]—issues I, III, IV, and a portion of issue VI from Blue Granite's appellant's brief. The rate treatment applied with respect to these matters by the Commission—as with the other issues on appeal—ignored the evidence in the record, was without a rational basis, and was imposed arbitrarily and capriciously. As discussed below, the impact of the Commission's erroneous rate treatment, in combination with its unlawful stay of Blue

[1] As explained below in § III of this brief, the Company believes that ORS does not proffer argument as to the rent expense issue, but instead references the issue as related to its arguments addressing the office upfit costs.

Granite's implementation of rates under bond, deprives the Company of cash flow and liquidity, which is necessary to fund the Company's ongoing utility operations.

As an additional preliminary matter, there is apparent conflict among the parties as to whether the Executive Summary of Order No. 2020-306 (the "Order")—pages 2 through 17 of the Order—may be relied upon. (R. pp. 243-258). While the Consumer Advocate relies upon it sparingly, citing to its contents only once in its respondent's brief, ORS relies upon it heavily, citing to it at least nine times over six pages. Blue Granite did not rely upon the Executive Summary in its briefing before this Court, and it takes issue with any party's reliance upon those pages of the Order in its own briefing. Order No. 2020-306 states that its Executive Summary is provided only for the convenience of the reader, and that it is the substance of the Order that follows which binds the parties. *See* Order No. 2020-306 at 2, 17. (R. pp. 243, 258). It is true that the Executive Summary also stipulates, as ORS points out, that the Executive Summary does not control if it conflicts with the remainder of the Order; certainly if there were any conflict between the Executive Summary and the body of the Order, the body would control. Order No. 2020-306 at 2, 17 (R. pp. 243, 258); ORS Brief at 10 n.3, 25 n.12. But it is clear from the language of the Executive Summary that it "is only provided for the convenience of the reader," and that "[i]t is the text of the findings and actions of the Commission's Order below that is controlling in construing the plain meaning of any finding or ruling of the Commission." Order No. 2020-306 at 17. (R. p. 258).

I. The Consumer Advocate brief tries but fails to show that there was evidence supporting the Return on Equity adopted by the Commission.

In its appellant's brief, Blue Granite demonstrated that none of the three expert witnesses called to testify to the appropriate ROE offered an opinion that supported the 7.46% ROE adopted

by the Commission. The respondent's brief submitted by the ORS did not address the ROE issue.[2] The Consumer Advocate Brief did address the ROE issue and argued that its witness, Aaron Rothschild, offered testimony supporting the 7.46% ROE adopted by the Commission. This reply brief will show that Rothschild did not offer an opinion supporting the 7.46% ROE and that the Commission's determination of the appropriate ROE is therefore unsupported by the record and unlawful.

As discussed in the Blue Granite appellant's brief, this Court has held that in order to meet the standards of *Bluefield Waterworks v. Public Service Commission of West Virginia,* 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944), the Commission must set utility rates that provide the utility a reasonable opportunity to earn a fair rate of return on its capital deployed to serve its customers. See Blue Granite appellant's brief pp. 13-14. This Court has been consistent in requiring that the Commission base its determination of the appropriate ROE on recommendations of experts testifying in rate case proceedings. In *Hamm v. South Carolina Public Service Commission,* 309 S.C. 282, 422 S.E.2d 110 (1992) this Court reversed an electric utility rate case decision by the Commission because it set rates using an ROE between the recommendations of the estimates offered by the expert witnesses testifying in the case but not supported by any specific witness. In two cases decided in 1998 – *Porter v. South Carolina Public Service Commission,* 332 S.C. 93, 504 S.E.2d 320 (1998) and *Porter v. South Carolina Public Service Commission*, 333 S.C. 12, 507 S.E.2d 328 (1998) – rate case decisions by the Commission for natural gas and telephone companies were reversed because the Commission used ROEs that were not supported by the record. In both cases the Commission used an ROE

[2] It is understandable that the ORS did not attempt to defend the Commission's ROE of 7.46% since ORS witness David Parcell testified that rates should be set using a ROE of 9.45%. Tr. pp. 1004.3-1004.4 (R. pp. 1072-1073).

between the ROE recommendations of various witnesses who testified in the cases but which was not supported by any specific witness. These cases demonstrate that this Court has insisted that the Commission base its decisions on expert testimony supporting the specific ROE used by the Commission in setting rates.

In the Blue Granite case, the Commission set rates for the Company using a ROE of 7.46%. As discussed in detail in the Blue Granite appellant's brief, no witness supported the ROE of 7.46%. See Blue Granite appellant's brief pp. 15-19. In an implicit acknowledgment that the Commission's ROE determination must be supported by the recommendation of an expert, the Consumer Advocate argues that witness Aaron Rothschild recommended the 7.46% ROE. That argument is disingenuous and unpersuasive. In his testimony, Rothschild made his recommendation of 8.65% clearly and unambiguously:

> Conclusion: Based on the evidence presented in my testimony, I conclude that the cost of equity allowed for the company should be 8.65 percent with an overall cost of capital of 7.27 percent. See Table 1. My recommendation satisfies the requirements of Hope and Bluefield that required utility companies should have an opportunity to earn a return commensurate with returns on investments in other enterprises having corresponding risks.

Tr. pp. 670-671 (R. pp. 945-946).

Despite the clarity of Rothschild's testimony, the Consumer Advocate Brief now attempts to rewrite his recommendations. First, it asserts that Rothschild offered the Commission "a ROE range." Consumer Advocate Brief p. 12. However, Rothschild himself was asked about that issue by Commissioner Hamilton during the hearing and made it clear that he wasn't offering a range.

> Q. Mr. Rothschild, is there any particular reason that you recommended point estimates for the company's ROE and cost of capital rather than the interval estimate?
>
> A. (Rothschild) Why did I recommend 8.65 instead of – instead of a range?

Tr. p. 720 ll. 1-6 (R. p. 1048, lines 1-6). Rothschild did not recommend a range. He recommended

a specific ROE of 8.65%, fully 119 basis points above the ROE adopted by the Commission and used to calculate the rates it approved for Blue Granite.

The reason that the Consumer Advocate Brief asserts that Rothschild offered his recommendation to the Commission in the form of a range is that it is part of the Consumer Advocate's attempt to convert Rothschild's preliminary calculations of various cost of equity models into an expert opinion that was recommended to the Commission. In a table presented as part of his testimony, Rothschild set out the results of several calculations that he performed to arrive at his recommended ROE of 8.65%. Tr. p. 672.9 (R. p. 955). One of the numbers that appears in that table is 7.46%. However, that is not the ROE recommended by Rothschild. His testimony repeatedly and emphatically asserts that the ROE that will satisfy the requirements of *Hope* and *Bluefield* and which should be used by the Commission is 8.65%. In fact, Rothschild's testimony and exhibits assert his ROE recommendation of 8.65% no fewer than sixteen times.[3] *See also* Blue Granite Appellant's Brief pp. 18-19. At no point in his testimony, exhibits or tables does Rothschild offer the opinion that any ROE range meets the *Hope* and *Bluefield* standard and at no point does he offer the opinion that a ROE of 7.46% meets that standard.

The Commission committed a clear error of law by adopting the ROE of 7.46% that was utterly unsupported by the record. The argument in the Consumer Advocate Brief that Rothschild actually recommended a range including the 7.46% ROE is a cynical attempt to rewrite the record that should be rejected by this Court.

[3] Tr. pp. 661, 662, 670, 671, 672.4, 672.5, 672.6, 672.7, 672.8, 672.9, 672.10, 672.13, 672.27, 672.74, 672.75, 683.26, 720, 722 (R. pp. 942, 943, 945, 946, 950, 951, 952, 953, 954, 955, 956, 959, 973, 1020, 1021, 1045, 1048, 1049).

II. In spite of ORS's arguments, the Commission's 10-year storm cost normalization is unsupported by the record.

Contrary to the arguments offered in the ORS Brief, there is no reasoning or rationale articulated in the Order supporting the Commission's imposition of a 10-year storm cost normalization, and there is no evidence in the record supporting such normalization. The only evidence in the record supports either recovery of the test year storm costs or a five-year normalization, and, because the Commission made no conclusion that the test year figures were atypical and in need of adjustment, the test year storm costs should be used.

As explained in Blue Granite's appellant's brief, the Commission's decision to apply a 10-year normalization was supported only by the following "reasoning": "There is disagreement between the parties regarding this adjustment. The Commission finds that this adjustment is just and reasonable and adopts the same." Order No. 2020-306, p. 86 (R. p. 327). While ORS argues that the Order's few passing references to Mr. Bickley's testimony provides sufficient support for the Commission's decision-making—ORS Brief at 13—such does not comport with the requirement that the Commission's own findings be "sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. at 21, 507 S.E.2d at 332.

While ORS asserts in its brief that a 10-year normalization is more "accurate," this claim of "accuracy" is naked and without any evidentiary support. ORS Brief at 13. In other words, ORS's claim of accuracy of a 10-year normalization "is of no probative value because it is not accompanied by an underlying showing of the evidentiary basis on which it relies." *Parker v. South Carolina Public Service Comm'n*, 281 S.C. 215, 217, 314 S.E.2d 597, 599 (1984) (citing *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671, 678 (1978) (*Tide Craft*)) (*Parker*). In two places in its brief, ORS takes issue with Blue Granite's reliance upon this Court's precedent

requiring that the Commission's findings have an evidentiary basis. ORS Brief at 13-14, 19 n.7. Specifically, ORS argues that Blue Granite cannot rely upon *Parker* because it did not make an objection during the hearing. *Id.* This concern is misplaced. In *Parker* and *Tide Craft*, this Court found that the *record* was inadequate to support the lower tribunal's conclusion because the witness's opinions were not supported by an evidentiary showing of the underlying facts. Those opinions had nothing to do with objections to testimony and instead stood for the proposition that the court's findings cannot "rest on conjecture and speculation, which is prohibited." *Tide Craft*, 270 S.C. at 470, 242 S.E.2d at 679 (citing *Horton v. Greyhound Corp.*, 241 S.C. 430, 438, 128 S.E.2d 776, 781 (1962)). In direct contrast to this lack of evidence, Blue Granite witness Mr. DeStefano provided the following testimony supporting a five-year normalization:

> We are not opposed to using a multi-year historical average of costs, but we believe that a more recent average should be used, particularly since **South Carolina has experienced more severe storms—and as a result, the Company has experienced consistently higher levels of storm recovery costs—in recent years**. See the following table:

Year	Storm Costs	Five-Year Average
2010	$16,207.41	
2011	$31,631.02	
2012	$1,510.19	$14,533.90
2013	$4,942.69	
2014	$18,378.21	
2015	$47,938.40	
2016	$43,737.13	
2017	$33,469.27	$42,493.62
2018	$54,716.21	
2019	$32,607.10	

> Accordingly, as an alternative to using the actual incurred Test Year level of storm recovery expense as the Company originally proposed ($51,802), the Company proposes an average of the last 5 years (2015-2019) of storm recovery expenses, which is $42,494.

Tr. p. 764.21, l. 22 through Tr. p. 764.22, l. 5 (R. p. 1057, line 22-p. 1058, line 5) (emphasis added).

While Blue Granite, as discussed above, was not opposed to using a multi-year historical average of costs, its witness testified that a more recent average should be used, since the Company has experienced consistently higher levels of storm recovery costs in recent years, and demonstrated so clearly in the record. Tr. p. 764.21, l. 22 through Tr. p. 764.22, l. 2. (R. p. 1057, line 22-p. 1058, line 2). However, the Commission made no conclusion that the test year figures in this case were atypical. The object, in general, of using test-year ratemaking is to reflect typical conditions. *Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. at 312, 313 S.E.2d at 292. "Where an unusual situation exists which shows that the test year figures are atypical the Commission should adjust the test year data." *Id.* In spite of Blue Granite offering a five-year normalization, the Commission made no conclusion in this case that the test year figures were atypical and in need of adjustment. The annual expenses of any enterprise, including utilities, will vary from year to year, and such annual variation does not inevitably lead to a conclusion that one year's expenses are atypical. The Commission's failure to make an affirmative finding that the test year figures in this case were atypical requires that the expense level be set at Blue Granite's test year level of $51,802.

Finally, ORS summarily disregards Blue Granite's argument that the Commission's setting of rates at a confiscatorily low level is an unconstitutional taking. ORS Brief at 14. As noted in Blue Granite's appellant's brief, the U.S. Supreme Court took up this issue in *Duquesne Light Company v. Barasch*:

> Although [a public utility's] assets are employed in the public interest to provide consumers of the State with electric power, they are owned and operated by private investors. This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment.
>
> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. If the rate does not afford sufficient compensation, the State

> has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.

Duquesne Light Company v. Barasch, 488 U.S. 299, 307-08 (1989). As explained above, the rate established in this case does not permit Blue Granite to adequately recover its annual storm recovery costs, and the Commission has therefore "taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Id.*

Because the only evidence in the record supports either recovery of the test year storm costs or a five-year normalization, and, because the Commission made no conclusion that the test year figures were atypical and in need of adjustment, the test year storm costs should be used.

III. ORS fails to support the Commission's erroneous decision-making or overcome the presumption of reasonableness owed to the Company as related to its office upfit costs and rent expense.

ORS's arguments fail to support the Commission's decision-making or overcome the presumption of reasonableness owed to the Company as related to its office upfit costs. Further, as explained below, ORS did not include the rent expense issue in its statement of issues, and instead limited itself to the upfit cost issue. The Company therefore believes that the Company's positions as to the rent expense issue are uncontested, but nevertheless addresses the substance of ORS's arguments below.

A. ORS's challenge to the Company's office upfit costs fails to overcome the presumption of reasonableness due to the Company.

While ORS attempts to justify the Commission's decision to disallow the Company's headquarters office upfit costs, its arguments are absent from the Commission's Order, and none of its arguments overcomes the presumption of reasonableness owed to the Company.

The Commission completely disallowed the Company's office upfit costs stemming from its decision to move its headquarters to Greenville. As detailed in its initial brief, the only evidence

in the record demonstrated that Blue Granite's decision to move was reasonable and based on several factors. As explained by Company witness Don Denton:

> While I agree with ORS that the CBRE Total Index scores are not conclusively determinative as to which city is best suited for the Company, the attributes of Greenville versus Columbia/West Columbia better match our long-term goals of attracting and retaining talented employees and growth throughout the state. As shown below, the labor force, projected population growth, and the balance between labor supply and labor affordability statistics from the CBRE reports support our decision to relocate to Greenville[.]
>
> ***
>
> The Company and the industry as a whole are facing aging workforce issues, and the eligible workforce is shrinking, so ensuring that the right professionals are being attracted to the Company and retained by the Company is fundamental to the Company's ability to continue providing quality and cost-effective service. As shown above, the statistics indicate that Greenville has a larger workforce and a larger expected population growth than Columbia and West Columbia. We believe these demographics will help us as we face the need to add new employees.

Tr. p. 355.6, l. 10 through p. 355.7, l. 10. (R. p. 875, line 10-p. 878, line 10). The Commission's Order and ORS Brief focus almost exclusively on "legacy brand issues," but ignore much of the actual evidence in the record, which shows that the Company's former industrial park location made it difficult to attract and retain high quality employees—Tr. p. 355.4, ll. 7-9 (R. p. 8875, lines 7-9)—and that the new location matched the Company's long-term goals of attracting and retaining talented employees in the state. Tr. p. 355.6, ll. 11-13 (R. p. 877, lines 11-13). Additionally, CBRE data indicated the labor supply and affordability of Greenville was more reasonable than Columbia or West Columbia. Tr. p. 355.6, ll. 13-16 (R. p. 877, lines 11-13). While ORS complains that the CBRE scores were only minimally in favor of Greenville and thus do not justify the relocation decision, the evidence in the record shows that the CBRE data was not the only factor driving the relocation decision, neither does ORS' opinion on this issue overcome the presumption of reasonableness and good faith by Company management.

As pointed out by ORS, the Company did rely upon the JLL benchmarking guide, but the record shows that the Company's upfit costs were more than 20% less than the lowest-cost domestic city listed in that report. Tr. p. 355.5, ll. 11-13 (R. p. 876, lines 11-13). Critically, even assuming that the upfit costs were unreasonable or above-market—though there is no evidence in the record to support such a finding—no party offered any evidence as to what amount of upfit costs actually would have been reasonable. "The PSC must not deny an application in its entirety when only a small portion of the expenditures claimed by the utility have been called into question." *Utils. Serv. of S.C. Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 115, 708 S.E.2d 755, 765 (2011) (*Utilities Services*).

To support its argument that the Commission's decision to disallow the office upfit costs was appropriate, ORS argues that the Company must show that it made "every reasonable effort to minimize costs," citing *Utilities Services*. This selective quote, however, ignores that which came before, namely that Blue Granite's "expenses are presumed to be reasonable and incurred in good faith" unless and until evidence in the record "rais[es] the specter of imprudence." *Utilities Services*, 392 S.C. at 110. ORS offered no evidence, apart from unsupported testimony, and there is no evidence in the record, suggesting that the upfit costs were above-market or otherwise unreasonable. ORS thus failed to "raise the specter of imprudence" as required in *Utilities Services*.

The ORS Brief also offers as relevant that the Company's former headquarters was in a county where a plurality of its customers reside, and the new headquarters in a county with a lower customer percentage. ORS Brief, pp. 15, 19. Perhaps ORS maintains that a utility's headquarters must be where a plurality of its customers reside, but South Carolina law includes no such requirement, and ORS cites to none. This argument is, indeed, of no relevance in rate-setting.

There is any number of other utilities whose offices are located out-of-state who routinely recover their overhead expenses through South Carolina rates.

Finally, ORS continues to misconstrue the Company's prior representations regarding its name change and branding. The Commission's Order and ORS Brief rely upon a customer notice filed in Commission Docket No. 2018-365-WS—a docket exclusively involving Blue Granite's request for a name change and captioned by the Commission as "Request for Name Change of Carolina Water Service, Incorporated to Blue Granite Water Company"—to support the proposition that the costs of the office upfit should not be included in rates. Order No. 2020-306 at 97 (R. p. 338); ORS Brief at 16. The Company's new logo design, signage, uniforms, and vehicle decals that were updated to reflect the new name of the Company were, indeed, excluded from the Company's revenue requirement.[4] It is illogical, however, to consider necessary office upfit costs—which consisted of drywall and telephone lines—to be considered a part of the Company's rebranding. Blue Granite has lived up to its commitment that the name change would have no impact on customer rates, but the representation cannot fairly be deemed to hamstring the Company from ever moving to a new office and prohibit the recovery of those reasonable costs.

The Commission should not be given a veto over a utility's prudent management decision as to the location of its headquarters. The Commission's Order was clearly erroneous in light of the substantial evidence of record, and arbitrary and capricious. This Court should remand with instructions that the Commission approve rates allowing the recovery of the office upfit expenses. While ORS focuses on cost savings to support an argument that the expenses should be disallowed, as a utility that serves the public, the Company must also consider the operational impact of its

[4] These costs were inadvertently included in the Company's initial application and later removed when identified. Tr. p. 764.4, ll. 8-9 (R. p. 1055, lines 8-9).

workforce on its customers. If the Company is unable to attract and retain talented employees due to its headquarters' physical location, it must make the prudent management decision to relocate that office. In this case, that is precisely what Blue Granite did, and its prudent management decision is beyond the review of the Commission. *See O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 268, 51 S. Ct. 130, 135 (1931) (Van Devanter, McReynolds, Sutherland, and Butler, J.J., dissenting) ("[I]t must be accepted as settled that the right to regulate a business does not necessarily imply power to . . . trespass on the duties of private management."); *Sw. Bell Tel. Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289, 43 S.Ct. 544, 547 (1923) ("The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers."); Order No. 2005-42 at 31, Docket No. 2004-212-S (Feb. 2, 2005) (R. p. 57) ("While this Commission's decisions are often based on the prudence or imprudence of management decisions, those decisions involve a review of the management decisions, and this Commission has no authority to manage the utility.").

B. ORS failed to raise the specter of imprudence as related to Blue Granite's office rent expenses.

While ORS briefly references the rent expense issue in the argument section of its respondent's brief, it did not include the issue in its "Counterstatement of Issues Presented", and instead limited itself to the upfit cost issue.[5] ORS Brief at 1, 2-5. S.C.A.C.R. 208(b)(2) provides that "[t]he brief of respondent shall conform to the requirements of Rule 208(b)(1)(A)-(F)," and

[5] The Company believes that ORS references the rent expense issue as related to its arguments addressing the office upfit cost issue, rather than actually proffering argument as to the rent expense disallowance. Nevertheless, out of an abundance of caution, the Company addresses the issue on reply here.

S.C.A.C.R. 208(b)(1)(B) provides that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Pursuant to S.C.A.C.R. 208, the Company believes that ORS is bound by its own statement of issues, and therefore that the Company's positions as to the rent expense issue are uncontested. Without waiving this position, the Company addresses below the modicum of substance to ORS's arguments related to the Company's headquarters rent expense.

ORS states that the Company's headquarters rent expense does not offset its annual savings in water, sewer, electric, gas, landscaping, and property tax expenses previously incurred for its former office. ORS Brief at 17. Such a position fails to "raise the specter of imprudence" and support the Commission's arbitrary and capricious disallowance of the Company's office rent expense. *Utilities Services*, 392 S.C. at 110. There is no evidence in the record demonstrating that Blue Granite's office rent expense was above-market or unreasonable, and, in fact, ORS did not oppose the Company's recovery of its office rent expense while this matter was pending before the Commission. ORS Brief at 17 n.6 ("ORS did not recommend denying recovery of the remaining annual rent expense associated with the Greenville office."). The Commission's decision to disallow all of the Company's office rent expense is flatly punitive, not supported by evidence or recommendation of any party in the record, and should be rejected.

IV. The Commission's stay of Blue Granite's implementation of rates under bond is unlawful.

The Court should reject the Consumer Advocate's argument that the Commission has essentially unlimited authority that supersedes the plain provisions of S.C. Code Ann. § 58-5-240(D). Instead, the Court should recognize that the statute expressly grants utilities the right to implement rates during appeal subject to refund. Further, although the Consumer Advocate argues that, because Blue Granite requested an accounting order, it cannot now argue that the

Commission's stay of the implementation of rates under bond is *ultra vires* or that it effects a substantive due process violation, these arguments are unavailing as explained below.

While this has been a theoretical discussion thus far, based upon the submitted briefs, no party contests Blue Granite's positions as to the Commission's erroneous rate treatment of ongoing purchased water and wastewater expenses, erroneous disallowance of certain expenses incurred as a result of Administrative Law Court proceedings, erroneous disallowance of legal expenses from two previous Commission proceedings, and erroneous disallowance of the Company's headquarters office rent expense,[6] for a total annual revenue requirement impact of over $2 million. The very real impact of this erroneous rate treatment, in combination with the Commission's unlawful stay of Blue Granite's implementation of rates under bond, is an ongoing deprivation of actual cash flow and liquidity, which is needed to fund the Company's ongoing utility operations.

A. The Consumer Advocate's argument that the Commission has authority to set just and reasonable rates fails to acknowledge utilities' statutory right to implement rates subject to refund pursuant to S.C. Code Ann. § 58-5-240(D).

The Consumer Advocate argues at length about why it believes the Commission has authority to establish just and reasonable rates, but it fails to explain how the Commission can ignore the plain provisions of S.C. Code Ann. § 58-5-240(D) and stay the implementation of rates under bond. Instead, the Consumer Advocate argues that the Commission has essentially unlimited authority as long as the resulting rates are just and reasonable. Consumer Advocate Brief at 29-30. This is simply untrue. Administrative agencies, such as the Commission, are creatures of statute and "have only the authority granted them by the legislature." *Responsible*

[6] As noted above, while ORS briefly references the rent expense issue, the Company does not believe that its positions as to the rent expense issue are contested.

Economic Development v. South Carolina Dep't of Envir. Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007).

S.C. Code Ann. § 58-5-240(D) is unequivocal as to the specific right conferred upon utilities to implement rates protected by a bond or protected by some other substitute arrangement. That statute is also unequivocal as to the attendant, narrow role of the Commission in reviewing the bond or in approving a substitute "for the bond." While Blue Granite acknowledges the Commission's role in affixing just and reasonable rates, as set out in S.C. Code Ann. § 58-3-140, and in correcting rates that are unjust and unreasonable, as set out in S.C. Code Ann. § 58-5-290, these general provisions conflict with and must yield to the specific provisions in S.C. Code Ann. § 58-5-240(D), which expressly grant utilities the right to implement rates subject to refund during the appeals process. *See Lloyd v. Lloyd*, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988) (citing *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 326 S.E.2d 395 (1985)) ("As a general principle, specific laws prevail over general laws . . . .").

The Consumer Advocate relies upon S.C. Code Ann. § 58-5-290 to support the proposition that the Commission can stay the implementation of rates under bond. The procedures provided in S.C. Code Ann. §§ 58-5-240 and 58-5-290, however, are incompatible and must be read as independent ratemaking procedures. "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Statutes in apparent conflict should, if reasonably possible, be construed to allow both to stand and to give effect to each." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000) (internal citations omitted). Statutes cannot be construed as to be meaningless or a nullity; rather, "all provisions of a statute must be given full force and effect." *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992) (internal citations omitted); *see also Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) (concluding

that an interpretation that renders part of a statute meaningless violates the Court's rules of statutory interpretation).

There is an irreconcilable paradox in the Consumer Advocate's view of how S.C. Code Ann. § 58-5-240(D) and 58-5-290 should operate. Under S.C. Code Ann. § 58-5-240(D), the utility—as a matter of right and subject to refund—implements rates higher than those found by the Commission as being just and reasonable pursuant to the rate application and hearing process specified in S.C. Code Ann. § 58-5-240. Concluding that the Commission can then suspend those higher rates under S.C. Code Ann. § 58-5-290 would render S.C. Code Ann. § 58-5-240(D) meaningless and without effect.

B. The Consumer Advocate incorrectly argues that, because Blue Granite sought an accounting order, it cannot now argue that the Commission's stay on the implementation of rates under bond is *ultra vires* or that it effects a substantive due process violation.

The Consumer Advocate argues that, because Blue Granite requested an accounting order, it cannot now argue that the Commission's stay of the implementation of rates under bond is *ultra vires* or that it effects a substantive due process violation. Consumer Advocate Brief at 26-27. These arguments are unavailing. In its brief, the Consumer Advocate cites to *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 692 (2003) and states that a party may not argue one ground at trial and an alternate ground on appeal, implying that Blue Granite did not raise these grounds to the Commission. Consumer Advocate Brief at 26. This is false. The second and third sentences of Blue Granite's petition for reconsideration of the stay order are quoted as follows: "The stay is an *ultra vires* act that exceeds the bounds of the Commission's authority. The stay also constitutes arbitrary and capricious decision-making and violates Blue Granite's substantive due process rights by depriving Blue Granite of a statutorily granted property interest." (R. p. 837.) Clearly these grounds were raised to the trial court.

Thereafter the Consumer Advocate incorrectly asserts that, because Blue Granite has obtained an accounting order deferring the lost revenues, it cannot now attack the stay as an *ultra vires* act or a denial of substantive due process. Consumer Advocate Brief at 26-27. The Commission's unlawful stay forced Blue Granite to seek an accounting order to account for the revenues lost between the Commission's implementation of the stay and when the Company is eventually able to implement rates under bond or when new rates are established at the final disposition of this appeal. The analysis in this case is complicated by the prohibition on retroactive ratemaking. While in a typical litigation proceeding between two parties the aggrieved party may be made whole, in this utility ratemaking context, Blue Granite is precluded from being made whole by the long-standing prohibition on retroactive ratemaking. *See, e.g., Hamm v. Pub. Serv. Comm'n of S.C.*, 310 S.C. 13, 20 (S.C. 1992). For that reason, while customers would be protected by the bond obtained by Blue Granite pursuant to S.C. Code Ann. § 58-5-240(D), and the 12 percent interest covered by the bond, without implementation of its rates under bond, Blue Granite does not have similar protection. Instead, the deferral is providing an accounting for *potential* future recovery while this matter is under appeal. The deferral, however, does not supply the Commission with authority to ignore S.C. Code Ann. § 58-5-240(D) and stay the implementation of rates under bond, nor does it resolve the denial of Blue Granite's property interest in increased revenues while the appeal is pending and during which Blue Granite must forego these revenues and suffer from degraded cash liquidity, despite being required to continue its utility operations and investments on an ongoing basis.

The accounting order also has no bearing on whether Blue Granite was denied a property interest in the revenues when the stay was implemented. S.C. Code Ann. § 58-5-240(D) confers a specific property interest to utilities in the revenues resulting from implementing rates under bond. Consistent with *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283-84, 721 S.E.2d

423, 427 (2012), and with the Commission's own extensive precedent on this issue, that statute "contains mandatory language that restricts the discretion of the agency." The denial of Blue Granite's receipt of increased revenues under S.C. Code Ann. § 58-5-240(D) due to the stay is a denial of that property interest, in spite of the potential and eventual availability of revenues from the deferral that protects the Company until the matter is resolved.

Finally, the Consumer Advocate asserts that the Commission treated the Company "fairly" in the underlying proceeding—Consumer Advocate Brief at 36—and incorrectly asserts that the Company made "numerous" references comparing the Order on appeal in this case to the Palmetto Utilities order, Order No. 2020-561. Consumer Advocate Brief at 33. In fact, the Company made *two* references to that order in its brief at pages 18 and 46. The Commission's improper conduct in this case was much more extensive than the discrepancies between the Commission's findings in this case versus those made in the Palmetto Utilities case. In this case, the Commission made a series of unreasoned decisions that slashed Blue Granite's rates, then unlawfully stayed the Company's implementation of rates under bond, and reposted the Consumer Advocate's "victory tweet" while the matter was still pending before the Commission, even after having rescinded the broad-based customer protections it had implemented for all utilities. It is additionally telling that no party even attempted to defend the Commission's decision-making as related to over $2 million in annual revenues. The Company respectfully disagrees that it was given fair treatment in this rate case.

CONCLUSION

For the reasons discussed herein and those presented in Blue Granite's appellant's brief, this Court should reverse and remand this matter to the Commission to establish rates that permit the Company to recover its prudently incurred expenses for providing utility service.

Respectfully submitted,

s/Samuel J. Wellborn
Frank R. Ellerbe, III, Esquire
Samuel J. Wellborn, Esquire
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
803.929.1400

Attorneys for Appellant

Columbia, South Carolina
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